



BRB No. 17-0029

KEREN ZAMBRANA)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: <u>June 29, 2017</u>
AIR FORCE INSURANCE FUND)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Keren Zambrana, San Antonio, Texas.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order (2015-LHC-01217) of Administrative Law Judge Larry W. Price, rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act.). In an appeal by a claimant without legal representation, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On October 25, 2012, claimant injured her left wrist and hand while working for employer as a teaching assistant/child care provider at the Gateway Child Development Center (CDC) on Lackland Air Force Base, San Antonio, Texas. Dr. Pace diagnosed claimant's injury as left wrist styloid tenosynovitis. He administered steroid injections and allowed claimant to return to work with a wrist splint and lifting restrictions. Dr. Pace subsequently performed surgery on claimant's left wrist on April 8, 2013, and thereafter released her to return to work again with lifting restrictions he expected to

gradually increase from five to twenty pounds.

On October 25, 2013, claimant reinjured her left wrist and hand while lifting a child at work, which resulted in Dr. Pace's performing a second surgery on April 21, 2014. Dr. Pace opined that claimant's left hand/wrist injury reached maximum medical improvement on August 27, 2014, with a residual ten percent impairment of her left upper extremity. Dr. Doores opined, on July 29, 2014, that claimant was at maximum medical improvement for her work injuries and capable of returning to regular work duty without any restrictions.

Claimant testified she had been hired by employer in the capacity of a flex employee, meaning she had no guaranteed hours and was on call. HT at 37. She stated that in the year preceding her October 25, 2012 injury, she averaged 24.4 hours of work per week and that her average weekly hours dropped following her first injury to 17.11 hours and to 11.5 hours after the October 25, 2013 work accident. CXs 1-3. Employer voluntarily paid claimant temporary total disability benefits from July 17 through August 11, 2013 and medical expenses from October 29, 2012 through October 8, 2015. Claimant sought additional benefits under the Act.

The administrative law judge found that claimant's work-related left hand/wrist injury became permanent on July 29, 2014, with a residual ten percent impairment rating of the upper left extremity. He found that claimant, through her testimony, demonstrated a prima facie case of total disability, and that employer established suitable alternate employment by offering claimant modified employment, at reduced weekly hours, within her post-injury lifting restrictions. The administrative law judge thus found claimant entitled to periods of temporary total and temporary partial disability benefits,¹ based on her average weekly wage of \$327.37 and post-injury wage-earning capacity of \$227.97, followed by a scheduled award of benefits for a ten percent arm impairment. The administrative law judge denied claimant's claim for further medical benefits.

Where, as here, claimant appeals without representation by counsel, the Board will review findings adverse to claimant pursuant to its substantial evidence standard of review. 20 C.F.R. §802.301. Employer has not responded to this appeal.

Maximum Medical Improvement

¹The administrative law judge awarded claimant temporary partial disability benefits from October 28, 2012 through July 16, 2013, and from August 12, 2013 through July 29, 2014, and temporary total disability benefits from July 17 through August 11, 2013. 33 U.S.C. §908(b), (c)(21).

A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period, or when the medical evidence establishes it reached maximum medical improvement. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). A claimant may be found to have reached maximum medical improvement when she is no longer undergoing treatment with a view toward improving her condition. *See Gulf Best Electric v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

The administrative law judge accepted the parties' stipulation that "[c]laimant reached maximum medical improvement on August 27, 2014." Decision and Order at 2. However, he concluded, based on Dr. Pace's statement that he released claimant from his care on June 3, 2014, EX 26, coupled with Dr. Doores's opinion that claimant was at maximum medical improvement on July 29, 2014, EX 14, that claimant's work-related injury became permanent on July 29, 2014. The administrative law judge did not set forth a rationale for rejecting the parties' stipulation on this issue, *Grimes v. Exxon Co., USA*, 14 BRBS 573 (1981), which we note is supported by the statement of claimant's treating physician, Dr. Pace, that claimant reached maximum medical improvement on August 27, 2014, with a ten percent residual impairment. EX 15. As the administrative law judge accepted the stipulations and adopted them as his findings, and as the stipulations are binding upon those who enter into them, *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986); *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985), we modify the administrative law judge's decision to reflect that claimant reached maximum medical improvement for her work-related left wrist/hand injuries on August 27, 2014, rather than July 29, 2014. Therefore, claimant is entitled to additional temporary partial disability benefits from July 30 through August 27, 2014.² *See* discussion, *infra*.

Suitable Alternate Employment

²Thus, claimant's scheduled award commences on August 28, 2014. The administrative law judge's finding that claimant has a ten percent permanent arm impairment is based on Dr. Pace's opinion, *see* EX 16, and is affirmed as it is supported by substantial evidence. *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998). Thus, we affirm the award for 31.2 weeks of permanent partial disability benefits under Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1), at the weekly compensation rate of two-thirds of \$327.37. *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003).

Once, as here, claimant establishes a prima facie case of total disability, employer may establish that claimant is at most partially disabled by identifying the availability of alternate jobs that are suitable for the claimant, considering her age, education, vocational history, and physical capabilities. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). Employer can meet its burden by providing claimant a suitable job at its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

The administrative law judge found that the Director of the CDC, Sherrie Walker, testified that employer accommodated claimant's light-duty restrictions after her work injuries.³ HT at 61-62. Claimant testified that she continued to work for employer after the initial work injury and following both of her surgical procedures, HT at 22, 43, which supports the administrative law judge's finding that employer established suitable alternate employment at its facility. Thus, the administrative law judge's conclusion on this issue is affirmed. *Darby*, 99 F.3d 685, 30 BRBS 93(CRT).

The administrative law judge awarded claimant temporary total disability benefits from July 17 through August 11, 2013, finding "[i]t is undisputed that claimant is entitled to [temporary total disability] compensation for that nearly four-week period." Decision and Order at 9. Specifically, the administrative law judge stated "[c]laimant was placed on temporary total disability from July 17 through August 11, 2013," and "at all other times, Dr. Pace released her to her usual job with lifting restrictions ranging from five to twenty pounds." Decision and Order at 8. The administrative law judge, however, did not address claimant's entitlement to temporary total disability benefits for the periods she did not work following her April 8, 2013 and April 21, 2014 surgeries.

The administrative law judge, in reciting the evidence, stated that Dr. Pace performed surgery on April 8, 2013, and "immediately afterward [claimant] was taken off work. On April 16, 2013, claimant was released to return to work with restrictions" Decision and Order 5. Claimant testified that she "was out of work for a week" following the first surgical procedure. HT at 22; Decision and Order at 3. That claimant was incapable of performing the post-injury modified work for employer between April 8 and 16, 2013, is supported by Texas Workers' Compensation Work Status Reports dated March 27, 2013 and April 16, 2013. CX 10 at 6-7. The former states claimant's injury

³The administrative law judge found that claimant's testimony establishes that her lifting restrictions prohibit her from working in the toddler classrooms. Decision and Order at 8.

will prevent her from working from April 8 through April 11, 2013, and the latter states that claimant can return to work on April 16, 2013.

Similarly, following claimant's second surgery on April 21, 2014, Dr. Doores's July 29, 2014 report states that on April 29, 2014 claimant could "RTW with restrictions." EX 14. A Texas Workers' Compensation Work Status Report dated April 29, 2014, states claimant could return to work with restrictions on that day. CX 11 at 4; *see also* CX 11 at 5.⁴ In light of this evidence which demonstrates that claimant was incapable of working while she recovered from the work-related surgeries, we modify the administrative law judge's decision to reflect claimant's entitlement to temporary total rather than temporary partial disability benefits for the periods from April 8 to 15, 2013, and April 21 to 28, 2014. *See J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).

Wage-Earning Capacity

Under Section 8(e) of the Act, 33 U.S.C. §908(e), a claimant is compensated for the amount of wage-earning capacity lost as a result of her work-related injury based on two-thirds of the difference between her average weekly wage at the time of injury and her post-injury wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that the claimant's wage-earning capacity shall be her actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992).

The administrative law judge found that claimant's actual wages and an average of her work hours in modified employment from the time of injury through the date of permanency reasonably represents her post-injury wage-earning capacity. The administrative law judge found that claimant averaged 17 hours per work during the 88-week period from October 28, 2012 to July 29, 2014. *See* CXs 2, 3. Multiplying this figure by claimant's hourly rate of pay, the administrative law judge concluded that claimant's post-injury wage-earning capacity during the period of her temporary partial disability was \$227.97, i.e., 17 hours x \$13.41 per hour. The administrative law judge's

⁴A determination that claimant missed approximately one week of work following the second surgery is further supported by a Texas Workers' Compensation Work Status Report dated March 25, 2014, which anticipated that claimant's second surgery would occur on April 7, 2014, and that, as a result, claimant would be out of work until April 16, 2014. CX 11 at 5. The surgery actually took place on April 21, 2014, and the indications that claimant could return to work on April 29, 2014 are consistent with the prior status report.

finding accurately reflects the evidence of record. *Id.* Accordingly, we affirm the administrative law judge's finding that claimant's post-injury weekly wage-earning capacity is \$227.97 as it is supported by substantial evidence. *Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT).

Medical Benefits

Section 7(a) of the Act, 33 U.S.C. §907(a), states "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." A claimant establishes a prima facie case for compensable medical treatment where a qualified physician states that the treatment is necessary for a work-related condition. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); 20 C.F.R. §702.402. In this case, the administrative law judge's finding that further treatment for claimant's work-related left wrist/hand injury is unnecessary is supported by Dr. Doores's opinion that claimant required no further medical care,⁵ *see* EX 14, Dr. Pace's opinion that he released claimant from his care on June 3, 2014, *see* EX 15, and the fact that no physician has recommended any additional treatment for symptoms relating to claimant's work injury. Decision and Order at 10-11. We therefore affirm the administrative law judge's denial of further medical benefits for her October 25, 2012 and October 25, 2013 injuries as it is supported by substantial evidence.⁶ *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F. App'x 126 (5th Cir. 2002).

⁵Dr. Doores stated, on July 29, 2014, that there is "no objective valid physiologic basis for [claimant's] current complaints" of left wrist/hand pain. EX 14.

⁶The administrative law judge rationally found that while Dr. Pace diagnosed claimant with carpal tunnel syndrome, he nevertheless released claimant from his care and subsequently opined that claimant's carpal tunnel symptoms were "unrelated to her work-related injury." EX 26.

Accordingly, the administrative law judge's decision is modified to reflect claimant's entitlement to temporary total rather than temporary partial disability benefits from April 8 through 15, 2013, and April 21 through 28, 2014, and to additional temporary partial disability benefits from July 30 through August 27, 2014.⁷ In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁷Employer is entitled to a credit for any temporary total or temporary partial disability benefits it paid during these periods.